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No. 00-529

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

MEDICAL MANAGEMENT SCIENCES, INC.,

Petitioner,

v.

MEDICAL BILLING, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Medical Billing, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

This is a contract case involving a principal amount of less than $2,000,000. It does not present any procedural or substantive issues requiring this Court's attention. It does not even present the issues identified in the Petition for Writ of *Certiorari*.

While Petitioner Medical Management Sciences, Inc. ("MMS") asserts that the District Court granted post-verdict relief against its Asset Purchase Agreement counterclaim on grounds not made pre-verdict, MMS has inexplicably failed to bring to this Court's attention one of the most significant portions of the record below. During the charging conference, MMS "amended its pleadings" to change the legal theory underlying its counterclaim only hours before the case was to be given to the jury. Specifically, MMS asserted for the first time that Respondent Medical Billing, Inc. ("MBI") had breached the Asset Purchase Agreement by terminating the parties' Billing Services Agreement *in 1994*. Counsel for MBI immediately advised the District Court that this new counterclaim was defective as a matter of law based upon the plain terms of the parties' agreements and the undisputed evidence. In response, the District Court explicitly informed all parties that the issue was fully preserved for post-verdict review:

> If you're in fact correct, Mr. Johnson, then either the jury will see that it obviously was an appropriate termination, or as I've indicated, I believe that I've tested all of these issues through the jury interrogatories, and to the extent that the jury reaches the conclusion that [the Billing Services Agreement] was terminated on August

> 1, 1994, and that terminating was wrongful [meaning that the termination breached the Asset Purchase Agreement], *I can decide after the fact whether or not that's an improper conclusion as a matter of law.*

(Ct. Tr. 4410) (emphasis added). After the jury reached precisely the legally defective verdict against which MBI's counsel had warned, the District Court – consistent with MBI's charging conference motion – ruled post-trial that the verdict was indeed "an improper conclusion as a matter of law." Lest there be any doubt regarding preservation, the District Court's opinion granting judgment as a matter of law stated the following:

> MBI continually argued that it was entitled to judgment as a matter of law on MMS's counterclaim seeking a return of the "unamortized" portion of the $2.7 million purchase price – from its Rule 56 motion, to its motions in limine, and through its arguments at the charging conference. The Court always proceeded on the assumption that MBI's request for judgment as a matter of law on this critical issue was and remained "on the table," and the Court expressly stated that it believed that issue could be, and presumably would be, revisited post-judgment.

(Pet. at Appendix B, p. 55a; R. 302, Mem. & Order at 23 n.9.)

On this record – even if one were to disregard all other facts and circumstances – it is clear that the District Court's grant of post-verdict relief was based upon grounds asserted

pre-verdict. Presumably for this reason, the United States Court of Appeals for the Sixth Circuit affirmed the dismissal of MMS's counterclaim without even addressing the procedural argument MMS now asserts is worthy of review by this Court. In short, because the actual record negates the only predicate for MMS's request that this Court grant a writ of *certiorari*, the petition should be denied.

A. The Parties and the Contracts

Respondent MBI is an Ohio company that provided medical billing services to Ohio-based radiology companies. Petitioner MMS was a Maryland company that provided medical billing services to radiology companies across the nation. Effective October 1, 1992, MMS and MBI entered into two contracts at issue here: the Billing Services Agreement and the Asset Purchase Agreement.

In the Billing Services Agreement, MBI retained MMS to perform comprehensive billing and collection services for each of MBI's clients. MMS agreed in the Billing Services Agreement to guarantee an increased level of collections for MBI's clients and to pay quarterly Volume Bonuses based upon increases in the number or complexity of procedures performed by MBI's clients. The Billing Services Agreement had a stated term of six years beginning in October 1992; however, it explicitly gave MBI the unqualified right to terminate the Agreement prior to the end of that term if, *inter alia*, MMS failed to pay the Volume Bonus, failed to honor its guaranteed increase in collections or defaulted in performing any other obligation.

The Asset Purchase Agreement memorializes MMS's purchase of MBI's physical and intangible assets. MMS paid

$2,700,000 to MBI pursuant to the Asset Purchase Agreement for (i) MBI's covenant not to compete with MMS in providing billing services to radiology firms and (ii) certain office furniture. Paragraph 4 of the Asset Purchase Agreement describes the consideration for the covenant in plain and simple language:

> Of the $2,700,000 payable hereunder, $2,690,000 is being paid for said Covenant Not To Compete.

B. The Contract Dispute

From the outset of their relationship in 1992, MMS proved itself incapable of collecting revenue for MBI's clients, causing a sudden and sharp decline in income for them. MMS also refused to pay the Volume Bonuses for either the first or second quarters of 1993. Because of these breaches, MBI on August 27, 1993 sent MMS a letter terminating the Billing Services Agreement effective October 15, 1993. As the jury found, however, MBI was induced by MMS's officers to retract that termination notice prior to its effective date.

Having retracted its termination, MBI continued under the Billing Services Agreement into 1994. MMS's failure to perform also continued. Although MMS was obligated to pay by January 10, 1994 almost $1,000,000 pursuant to the revenue guarantee, MMS refused to make that payment. Similarly, MMS refused to pay any Volume Bonus in 1994. Because of these facts, and MMS's inability to improve collections, MBI terminated the Billing Services Agreement on August 1, 1994. It commenced this lawsuit the same day.

C. Pre-Trial Proceedings in the District Court

In its complaint, MBI asserted a claim against MMS for, *inter alia*, breach of the Billing Services Agreement. MMS asserted a counterclaim alleging that MBI had not retracted its 1993 termination letter, but instead had "wrongfully terminated" the Billing Services Agreement effective October 15, 1993. Based upon this allegation, one would expect MMS to have alleged a legal theory of "anticipatory repudiation" and to have sought in damages any Billing Services Agreement profits that MMS lost by virtue of an early termination. It did not do so. Instead, MMS asserted that the alleged breach of the Billing Services Agreement *in 1993* somehow constituted a breach of the separate Asset Purchase Agreement, which in turn somehow entitled MMS to a "return" of a portion of the $2,700,000 paid to purchase MBI's assets. MMS, however, never identified any provision of the Asset Purchase Agreement that was breached and, specifically, never asserted a breach of the covenant not to compete.

Because of the legal defects in MMS's counterclaim, MBI moved for summary judgment against the counterclaim. MBI based its motion upon the fact that the Asset Purchase Agreement was a separate agreement that unambiguously stated that MMS paid $2,700,000 for a covenant not to compete and furniture and the absence of any proof that MBI had breached the Asset Purchase Agreement. At about the same time, MBI moved *in limine* to preclude parol evidence regarding the consideration MMS received for the $2,700,000.

On October 23, 1995, the District Court denied MBI's motion for summary judgment and motion *in limine* on the

ground that the agreements were ambiguous. As a result, the District Court permitted the counterclaim to go to trial and permitted MMS to present parol evidence to explain how the parties meant the two contracts to interact. Regarding the admission of parol evidence, the District Court stated: "I understand that this is a fairly dramatic decision. If I'm wrong, it could reverse the whole trial; but if I am wrong the other way, it would could [sic] reverse it the other way." (10/23/95 Tr. 21-22.) In making its rulings, however, the District Court never identified any ambiguity regarding the consideration MMS received for the $2,700,000.

D. Trial Proceedings in the District Court

The trial was conducted between October 16 and November 27, 1996. MBI's evidence that MMS had breached the Billing Service Agreement was for the most part uncontroverted. MMS could not and did not dispute that it had failed to pay either the Volume Bonus or the Guarantee shortfall payment in 1994. Instead, MMS's defense rested principally on its assertion that MBI had terminated the Billing Services Agreement in *October 1993*, such that – according to MMS – MMS had no liability to make those payments in 1994. MMS's affirmative case on its Asset Purchase Agreement counterclaim, meanwhile, consisted principally of testimony from its main shareholder that the $2,690,000 was not really consideration for a covenant not to compete, but was actually an "up-front" payment to MBI in return for higher billing rates in the Billing Services Agreement. This parol evidence was flatly inconsistent with the Asset Purchase Agreement's clear terms regarding consideration.

During trial, MBI filed a motion under Fed. R. Civ. P. 50(a) entitled "Plaintiffs' Motion to Dismiss Defendants' Counterclaims as a Matter of Law." This motion attacked the single theory upon which MMS had – up to that time – based its claim for return of the Asset Purchase Agreement's $2,690,000: the bogus assertion that MBI had actually terminated the Billing Services Agreement *in 1993*. The District Court reserved ruling on that motion.

By the conclusion of the evidence, it was apparent that MMS had failed to prove its proposition that the Billing Services Agreement terminated *in 1993*. Accordingly, MMS "amended its pleadings" at the charging conference – only hours before submission of the case to the jury. There, MMS asserted for the first time that MBI breached the Asset Purchase Agreement by terminating the Billing Services Agreement *in 1994*. In immediately objecting to this last-second switch, MBI argued that, under MMS's "amended" theory, the District Court could direct a verdict based upon the plain terms of the Billing Services Agreement and the undisputed evidence:

> MR. JOHNSON: I can address that pretty quickly. If the billing services agreement was in effect August 1, 1994, we had a right to terminate as a matter of law because then the guarantee revenue increase, which was due on January 10th, 1994, had not been paid. And that's precisely what all the evidence showed throughout the spring, that the guarantee was not paid. And so, the — any termination as of August 1, 1994, would be — you could direct that.

(Ct. Tr. 4409). The District Court's response made clear that MBI had asserted the relevant Fed. R. Civ. P. 50(a) motion

against MMS's freshly-minted amended Assert Purchase Agreement counterclaim:

> If you're in fact correct, Mr. Johnson, then either the jury will see that it obviously was an appropriate termination, or as I've indicated, I believe that I've tested all of these issues through the jury interrogatories, and *to the extent that the jury reaches the conclusion that [the Billing Services Agreement] was terminated on August 1, 1994, and that terminating was wrongful* [meaning that the termination breached the Asset Purchase Agreement], *I can decide after the fact whether or not that's an improper conclusion as a matter of law.*

(Ct. Tr. 4410) (emphasis added). The District Court then charged the jury with MMS's amended theory.

Having been charged with a defective legal theory, the jury responded with predictable confusion.

- The jury rejected MMS's primary factual contention: that MBI had "wrongfully terminated" the Billing Services Agreement *in 1993*. Instead, the jury found that MBI had retracted the termination, that the Agreement had continued *into 1994*, and that MMS breached the Agreement *in 1994*. The jury awarded MBI damages for MMS's breach. (R. 258, Jy. Ints.)

- As MBI had argued at the charging conference, the jury's finding that the Billing Services Agreement had continued into 1994 vitiated MMS's Asset Purchase Agreement counterclaim as a matter of law.

> Specifically, because the undisputed evidence gave MBI a right under the plain terms of the Billing Services Agreement to terminate *in 1994*, a termination *in 1994* could not have constituted a breach of the Asset Purchase Agreement. Notwithstanding that fact, as MBI had feared, the jury relied upon MMS's legally defective amended theory to find for MMS on its Asset Purchase Agreement counterclaim. (R. 260, Gen. Verd.) The jury then awarded damages of $1,868,000 as a "return" of a portion of the purchase price. (*Id.*)

E. Post-Trial Proceedings in the District Court

Faced with this disjointed verdict, the District Court – as it had predicted – had to determine whether the verdict on the counterclaim constituted "an improper conclusion as a matter of law." MBI moved post-trial pursuant to Fed. R. Civ. P. 50(b) for judgment as a matter of law with respect to the $1,868,000 verdict against MBI. (R. 269, Pls.' Post-J. Mot.) Consistent with its charging conference Rule 50(a) motion, MBI asserted that, because MBI had an undisputed right to terminate the Billing Services Agreement in 1994, its termination in 1994 could not as a matter of law have breached the Asset Purchase Agreement. (*Id.*) In response, MMS this time argued that the parties had actually agreed that MBI would "refund" $1,868,000 upon *any* termination of the Billing Services Agreement," regardless of whether that termination constituted a breach of the Billing Services Agreement. (R. 280, Defs.' Opp'n Post-J. Mot.) Thus, according to MMS, the "breaching act" was *now* the simple failure to refund money. (*Id.*) MBI replied to this attempt to create a new contractual obligation by invoking once again

the Parol Evidence Rule. (R. 282, Pls.' Reply Mem. Post-J. Mot.)[1]

On March 26, 1998, the District Court granted MBI's motion for judgment as a matter of law dismissing MMS's amended Asset Purchase Agreement counterclaim. (R. 302, Mem. & Order.) In granting MBI's motion against MMS's amended counterclaim, the District Court adopted MBI's charging conference motion:

> As noted above, MMS contends it is entitled to a return of some portion of the purchase price upon any termination of the Billing Services Agreement, *even a legitimate one*. This theory requires the conclusion that MBI's explicitly stated absolute right to terminate the Billing Services Agreement, upon the happenings of the conditions specified, is not absolute at all.

(R. 302, Mem. & Order at 40-41.) Concluding that such a theory "contradicts otherwise clear terms" of the Billing Services Agreement, the District Court determined that the jury had improperly rewritten the Billing Services Agreement and that, as a matter of law, the Asset Purchase Agreement was not breached. (*Id.*)

On this record, there is no factual basis for MMS's assertion that MBI did not make the appropriate motions either pre- or post-verdict. MBI struggled throughout this litigation to force MMS into a single, coherent legal theory regarding its defective counterclaim. Unable to devise a

1. MMS's assertion that MBI did not assert the parol evidence issues in its post-trial briefs is false. Indeed, MMS responded to those arguments.

sustainable claim, however, MMS continued to shift its theory right up to hours before the jury deliberated. Although MMS constantly moved the target, MBI hit the target with a consistent theory, as the District Court itself noted when rejecting the Rule 50 argument MMS is trying to assert here:

> MBI continually argued that it was entitled to judgment as a matter of law on MMS's counterclaim seeking a return of the "unamortized" portion of the $2.7 million purchase price – from its Rule 56 motion, to its motions in limine, and through its arguments at the charging conference. The Court always proceeded on the assumption that MBI's request for judgment as a matter of law on this critical issue was and remained "on the table," and the Court expressly stated that it believed that issue could be, and presumably would be, revisited post-judgment.

(Pet. at Appendix B, p. 55a; R. 302, Mem. & Order at 23 n.9.)

In short, MMS's description of the proceedings below omits the most relevant facts from the record below.

F. Proceedings in the Court of Appeals

On May 8, 2000, the United States Court of Appeals for the Sixth Circuit affirmed the judgment dismissing MMS's Asset Purchase Agreement counterclaim as a matter of law. *Medical Billing, Inc. et al. v. Medical Management Sciences, Inc. et al.*, 212 F.3d 332 (6th Cir. 2000). The majority held that the consideration terms of the Asset Purchase Agreement were unambiguous as a matter of law, thereby precluding the claim. Although MMS raised its Rule 50 argument before the Sixth Circuit, neither the majority *nor the dissent* addressed that argument.

MMS then filed a petition for rehearing *en banc*. MMS predicated its petition entirely upon its procedural argument that MBI had failed properly to preserve pre-verdict the grounds upon which post-verdict relief was granted pursuant to Rule 50. In denying that petition, the Sixth Circuit stated that "the issues raised in the petition were fully considered upon the original submission and decision of the case." *Medical Billing, Inc. et al. v. Medical Management Sciences, Inc., et al.*, Nos. 98-3561, 98-3564 (6th Cir. July 7, 2000) (order denying petition for rehearing). Accordingly, the Sixth Circuit has twice unanimously rejected the sole basis for MMS's contention that this case is now worthy of *certiorari*.

REASONS FOR DENYING THE WRIT

The Petition should be denied. The sole question presented by the Petition is whether a federal court may re-examine a jury verdict on legal grounds not preserved by the verdict-loser prior to submission of the case to the jury. The record below does not raise this question and – presumably for that reason – the Sixth Circuit's opinion does not even address this question.

First, as set forth above, MBI properly preserved, prior to the verdict, the particular legal grounds upon which judgment was entered in its favor. Thus, this case presents nothing more than a District Court's application of Rule 50 to a record that is peculiar to this case – particularly when one considers MBI's 11th-hour "amendment of the pleadings" and the District Court's assurance that the issue was preserved.

Second, contrary to MMS's contentions, there is no conflict among the circuit courts as to the proper

interpretation of Rule 50. Rather, there is a uniform interpretation to which all circuits agree. Indeed, MMS readily acknowledges that the Sixth Circuit itself follows what MMS asserts is the proper interpretation. (*See* MMS Mem. Supp. Pet. Rehearing at p. 2.) MMS's real complaint appears to be that this uniform interpretation gets applied in different ways depending upon the circumstances. That, however, is precisely the function in which courts are supposed to engage. As stated in Supreme Court Rule 10, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule." Supreme Court Rule 10. There was no **mis**application here, but if there had been, it would not warrant Supreme Court review.

Third, even if there were a split in the circuits, the record in this case would not enable this Court to resolve that split. Stated simply, there is a myriad of bases in the record to justify the outcome here. Under these circumstances, it is impossible to single out as dispositive the issue raised by MMS.

For the foregoing reasons, each more fully discussed below, MBI respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. THE COURTS BELOW APPLIED RULE 50 IN ACCORDANCE WITH ITS TERMS.

As set forth above, MBI preserved pre-verdict the issues upon which it was granted judgment dismissing MMS's Asset Purchase Agreement counterclaim. The District Court acknowledged MBI's motion, explicitly advised all parties

that it could revisit the issues raised post-verdict, ruled in MBI's favor on those grounds post-verdict and explicitly acknowledged in doing so that the issues had been properly preserved pre-verdict.

MMS's argument that MBI failed to preserve pre-verdict the grounds upon which its post-verdict motion was granted is so baseless that the Sixth Circuit has twice rejected it unanimously. First, MMS briefed its procedural argument extensively in both its opening and reply briefs in the Sixth Circuit appeal below. In affirming the judgment below, the Sixth Circuit majority recognized and rejected MMS's Rule 50 argument. *See Medical Billing Inc. v. Medical Management Sciences, Inc.*, 212 F.3d 332, 336 (6th Cir. 2000). While there was a dissent from the Panel's opinion, the dissent addressed only the substantive issue of whether the disputed contract was ambiguous. *Id.* at 340 (Merritt, J., dissenting). The dissent did not address the procedural argument at all. *Id.* As a result, the Panel was unanimous in rejecting it. Second, when MMS predicated a petition for rehearing entirely upon its Rule 50 argument, the Sixth Circuit denied the petition, holding that "the issues raised in the petition were fully considered upon the original submission and decision of the case." *Medical Billing v. Medical Management Sciences, Inc.*, Nos. 98-3561, 98-3564 (6th Cir. July 7, 2000) (order denying petition for rehearing). There is simply no basis in the record to support MMS's arguments to this Court.

Refusing to acknowledge the ramifications of its last-second change in theories underlying its counterclaim, MMS has tried in the past to belittle MBI's charging conference motion as mere "colloquy." One of MMS's own cases exposes the fallacy of that argument. In *Simon v. Navon*,

71 F.3d 9 (1st Cir. 1995), a District Court denied a post-verdict Rule 50(b) motion on the ground that the issue had not been raised in a pre-verdict Rule 50(a) motion. *Id.* at 14. In so doing, the District Court rejected the movant's argument that his motion had been made during an informal discussion of the issue in chambers. *Id.* On appeal, the First Circuit reversed, holding that the chambers conference discussion did indeed constitute a Rule 50(a) motion. *Id.* In particular, the First Circuit noted the District Judge's "expressed assumption that he would revisit the question in the event of a motion for judgment notwithstanding the verdict." *Id.* According to the First Circuit, this statement and other facts "could not **but** have led counsel to believe that what had been done thus far was enough to preserve the issue for post-judgment review." *Id.* (emphasis added).

MBI's record is much clearer than that involved in *Simon*. Here, MMS changed its theory at the last possible second and MBI objected. The District Court then permitted MMS to "amend its pleadings," a ruling that created significant prejudice to MBI. MBI responded to this last-second shift by immediately advising the District Court of the legal defect in the "amended" claim. Unlike *Simon*, the District Court here specifically acknowledged that, if MBI was correct, the District Court could revisit the issue post-verdict. When the District Court then did so, it acknowledged the charging conference motion as having provided it with a legal basis.

Had the District Court not prejudiced MBI by permitting the last-second amendment, MMS could never have obtained the defective verdict it obtained. Had the District Court not advised MBI that the issue was reviewable post-verdict, MBI would have taken additional steps to have ensured

reviewability. MBI justifiably relied upon the District Court's explicit statements and the issue was fully preserved.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE INTERPRETATION OF FEDERAL RULE 50.

As noted above, the Sixth Circuit has twice rejected MMS's procedural argument unanimously and it had an ample basis for doing so. After considering the relevant facts and the applicable law, the Sixth Circuit held that judgment was properly entered in MBI's favor. This does not, as MMS suggests, evidence some improper interpretation of Rule 50. Indeed, both the Sixth Circuit majority and dissent were virtually silent with respect to Rule 50.

In an attempt to attribute undeserved importance to this simple contract dispute, MMS argues that there is a conflict among the circuit courts on the broad, non-specific question of whether a party can obtain a post-verdict judgment on a ground that it did not advance in a timely pre-verdict motion. MMS drew the question so broadly so it could pull together – and rely upon – an otherwise unrelated group of cases. Thus, for example, MMS cites diverse cases in which the movant (i) relied solely upon a summary judgment motion to satisfy Rule 50(a), *Penbarr Corp. v. Insurance Co. of N.Am.*, 976 F.2d 145 (3d Cir. 1992), or (ii) failed to make a Rule 50(b) motion, *Cochran v. City of Los Angeles*, 222 F.3d 1195 (9th Cir. 2000). Many of these cases contain language that MMS purports to find disturbing, but MMS does not distinguish which of those cases contain *rulings* that MMS believes violates Rule 50 or the Seventh Amendment.

To the extent MMS has narrowed its broad question to a specific issue, MMS appears to focus upon cases from the Fourth and Eighth Circuits discussing whether a pre-trial Rule 56 motion for summary judgment provides a predicate for (i) a Rule 50(b) motion in the absence of a separate Rule 50(a) motion or (ii) an appellate reversal in the absence of any Rule 50 motion. MMS does not, however, assert that the Sixth Circuit is in conflict with *either* of these circuits on this narrower issue, and certainly does not suggest that the Sixth Circuit's opinion here even presents that particular issue. Indeed, because MMS did not clearly raise below whether MBI's Rule 56 motion provided the sole basis for the District Court's ruling (on this record, MMS could not have legitimately presented such an argument), the Sixth Circuit's opinion does not present that issue.

As noted, the only case cited by MMS that might be deemed remotely similar to this case is *Simon v. Navon*, where the First Circuit found an issue preserved by a District Court's express statement that a Rule 50 issue could be revisited post-judgment. While MMS assails the First Circuit's reference to a "modest departure from the formal procedures" of Rule 50, MMS does not suggest that that case was wrongly decided based upon its facts, that the ruling in *Simon* conflicts with the Sixth Circuit's opinion here or that the rulings in *Simon* and in the Sixth Circuit's opinion here conflict with a ruling from some other circuit. Indeed, because of the fact-based nature of the questions presented by the records here and in *Simon*, MMS could not possibly predicate a conflict in the circuits on such an issue.

As a result, MMS has not identified any split in the circuits on any specific issue that this Court could resolve by accepting this case. Moreover, with respect to the vague question MMS

has presented, there is no split whatsoever among the circuits. To the contrary, all 13 circuit courts interpret Rule 50 in a uniform manner in accordance with the language and purpose of the Rule. (*See* Pet. Writ Cert. at p. 11 (citing a recent case from each of the 13 circuit courts for the proposition that "a party is barred from obtaining a post-verdict judgment as a matter of law on a ground that it did not advance in a timely filed pre-verdict motion").) Indeed, as MMS acknowledged in its petition for rehearing in this case, the Sixth Circuit has made "authoritative pronouncements . . . regarding the ability of a party to revive an issue post-verdict that was not preserved pre-verdict." (MMS Mem. Supp. Pet. Rehearing at p. 2). Although MMS asserted that "the panel majority . . . rendered a decision in conflict with existing Sixth Circuit precedent," (*Id.* at p. 8), the Sixth Circuit itself did not deem that to be so. As a result, MMS should not be heard to characterize the panel's rejection of its Rule 50 argument here as having set forth a new standard – much less one that conflicts with other circuits. Stated simply, the Sixth Circuit did not see MMS's Rule 50 argument as having raised a legitimate issue, and this Court should not either.

Even if MMS had identified a true conflict between decisions rendered by different panels of the same court of appeals, this would not present a sufficient basis for granting a writ of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974). As Justice Harlan once wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Assn. 541, 552 (1958).

Ultimately MMS's complaint appears to be that various panels *within* the circuits have at times *applied* Rule 50 differently depending upon the particular circumstances presented by a case. That, however, is precisely the way our courts are supposed to function, and does not present a conflict in *interpretation* of a rule susceptible to review by this Court. Indeed, even if the Sixth Circuit misapplied Rule 50, a proposition clearly defeated by the facts here, this case would not raise any significant issue warranting this Court's review. As stated in Supreme Court Rule 10, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." Supreme Court Rule 10. Here, the Sixth Circuit has not misstated or misinterpreted Rule 50. The Court was silent regarding the Rule. Accordingly, this Court should deny the Petition.

III. THE RECORD IN THIS CASE DOES NOT PERMIT THE COURT TO ADDRESS THE ISSUE RAISED IN THE PETITION

Finally, even if there were a split in the circuits on a specific issue relevant to this case, the record here would not enable this Court to resolve that split. There is a myriad of bases in the record to justify the outcome here, and, because MBI won below, the Sixth Circuit had the power to affirm the District Court's judgment on any one of them. *See Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) (noting that an appellee may, "without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court"). As a result, it is impossible to single out as dispositive the issue MMS seeks to raise.

- As noted above, MBI's charging conference motion preserved for post-verdict review the legal viability of MMS's Asset Purchase Agreement counterclaim, based upon the plain terms of the parties' agreements and the undisputed evidence. The Sixth Circuit's failure to address MMS's Rule 50 procedural argument substantively could be read as a tacit acknowledgment of the flaw in the fundamental premise of the argument, *i.e.*, the issue was in fact preserved.

- MBI filed a pre-trial motion *in limine* to preclude parol evidence regarding the consideration for the Asset Purchase Agreement – which would have effectively precluded MMS from proving its counterclaim. That motion was based entirely upon the lack of ambiguity in the Asset Purchase Agreement. In denying that motion pre-trial, the District Court stated, "If I'm wrong, it could reverse the whole trial." (10/23/95 Tr. 21-22.) While MMS argues that the parol evidence issue "was dropped altogether at trial," the Sixth Circuit has held that a motion *in limine* need not be renewed at trial to be reviewable on appeal when, as here, the court made a definitive denial of the motion. *See United States v. Brawner*, 173 F.3d 966, 999 (6th Cir. 1999); *see also* Fed. R. Evid. 103 (Proposed Amendment effective December 1, 2000) (commentary) ("When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity.") Accordingly, the Sixth Circuit could have concluded that, regardless of MMS's procedural argument, (i) MBI had preserved in its pre-trial parol evidence motion the strictly legal issue regarding the lack of ambiguity in the Asset Purchase Agreement

and, (ii) MBI was entitled to judgment because it was correct on that issue as a matter of law.[2]

With respect to any of these issues (plus others), if MBI had lost at the District Court level, it could have appealed the ambiguity issue. Having won below, MBI cannot logically be in a worse off position.

MMS's petition might be read to contend that the Sixth Circuit ignored the strictures of Rule 50 – and created or furthered a split in the circuits – by reversing a motion for summary judgment that was not renewed in a Rule 50 motion. The Sixth Circuit, however, said *nothing whatsoever* to support MMS's contention. Moreover, as indicated above, there are several different interpretations of the Sixth Circuit's opinion, and MMS has not suggested that any one of them leads to a split in the circuits that needs to be reviewed by this Court. Indeed, because MBI prevailed below, and the Sixth Circuit had the power to affirm the District Court's judgment on any basis supported by the record, *see Dandridge*, 397 U.S. at 476 n.6, there may be other grounds in the record that led the Sixth Circuit to rule as it did.

In short, because the Sixth Circuit never engaged in a substantive interpretation of Rule 50, there is simply nothing for this Court to review.[3]

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2. Regardless of the motion *in limine*, the Sixth Circuit always has the power to review an evidentiary issue, such as the admission of parol evidence, under the "plain error" standard. *See United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999).

3. Indeed, because the Sixth Circuit opinion does not address Rule 50 in any substantive manner whatsoever, a reader of the opinion who (Cont'd)

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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(Cont'd)
was not involved in this litigation would not even be aware that a Rule 50 argument was made; thus, the opinion does not even suggest the possibility of a conflict, and would never lead litigants to believe that different rules applied in different circuits.